Ambrose

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N.J. 07102

BULLETIN 1830 December 12, 1968

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ITEM

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1. APPELLATE DECISIONS - 4 LEAF LIQUORS & LOUNGE - NEWARK.

4 Leaf Liquors & Lounge, (A New Jersey Corporation), Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	)	ON APPEAL CONCLUSIONS and ORDER

Irvin L. Solondz, Esq., Attorney for Appellant
Philip E. Gordon, Esq., by Charles J. Farley, Esq., Attorney for Respondent
Cummis, Kent & Radin, Esqs., by David Samson, Esq., Attorneys for Objector Newark Beth Israel Hospital
Jack Trugman, Esq., Attorney for Objectors other than Newark Beth Israel Hospital

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant challenges the action of respondent (hereinafter Board) which on April 24, 1968 denied its application for person-to-person transfer of a plenary retail consumption license from Famous Kartzman's Delicatessen to appellant for premises 1059 Bergen Street and 6-8 Harding Terrace, Newark. In accordance with Rule 10 of State Regulation No. 6, the following statement of reasons was set forth by the Board:

> "At the time of the hearing there appeared objectors who offered testimony and also a list of objectors who did not appear, as the stenographic transcript will reveal.
>
> "The licensee has maintained a business at its existing premises for many years. The type of business conducted was, mainly, a delicatessen.
>
> "The objectors' contentions, succinctly stated, is that fears are raised that the type of business to be conducted in the future, if this transfer is granted, would be entirely different from that which has been or had been conducted over the past years, essentially that it would be more of a tavern type business which, of course, a C license is entitled to under the statutes of this state.
>
> "This would seem to be borne by the testimony offered by Mr. Thomas when he stated he would remain open within the legal hours and to keep the side bar open as the business demands.

"There was discussion to the effect that if a person to person transfer was granted, that there be imposed conditions to the effect that the licensed premises be conducted in the same fashion in all details and respects as it had been over the years. However, according to the Revised Statutes of New Jersey, 33:1-32, the conditions that may be imposed would only relate to properly accomplish the objects of the general laws governing issuance of liquor licenses.

"It may be noted with some interest that conditions generally are to be supervised. This Board cannot act as a police enforcing body to see that conditions imposed are violated. This function normally rests in the hands of the Police Department. It would be impossible to request local police to supervise whether or not the conditions, if any, imposed were properly complied with, in the face of all the existing problems presently enforced within the City of Newark and particularly abounding the area of the instant site.

"As stated above, however, the conditions which the applicant is desirous of following would be conditions not generally encompassed by the Revised Statutes 33:1-32.

"It must be noted than an owner of a license acquires through his investment therein an interest which is entitled to some measure of protection in connection with a transfer. TOWNSHIP COMMITTEE OF LAKEWOOD v. GRANT, 38 N.J. Super. 462. This Board must act pursuant to rules and regulations, court decisions and most importantly its own sound and honest discretion. This Board must take into consideration the rights not only of the objectors, but of all the citizens and also of the licensee and the licensee's investment.

"This Board must also take into consideration in the exercise of its discretion and sound judgment, the health, safety and public welfare not only of all the citizens of Newark, particularly those within the area surrounding the instant site. It must consider the reasons for the transfer and whether or not the granting of same would have any adverse effect upon the health, safety and public welfare of the citizens of Newark.

"The record leaves no room for doubt that widespread local sentiment is opposed to the transfer.

"The interests of effective liquor control are best advanced where the municipal licensing program displays fair regard not only for the convenience of residents who purchase alcoholic beverages, but also of the sentiments of residents who are unsympathetic or hostile to their sale. FANWOOD v. ROCCO and DIV. A.B.C. 59 N.J. Super. 306.

"In light of all the testimony and for the reasons set forth herein, this Board finds in its valid exer-

> cise of judgment and sound discretion, that the best interests of the citizens, not only of the particular area of the instant site, but for the entire City of Newark that the application for transfer be denied."

The petition of appeal alleges that the action of the Board was arbitrary and capricious for reasons which may be summarized as follows:

> (a) the determination was based upon hearsay testimony "concerning possible conduct of the business in the future;"
>
> (b) No testimony indicated that the health, safety or public welfare of the citizens of Newark would be impaired, or that there is widespread sentiment opposed to the transfer;
>
> (c) No valid reasons for the denial were set forth in the Board's statement;
>
> (d) Appellant was denied a full hearing in that only two of the three members of the Board heard and acted upon the said application.

The answer of the Board admits the jurisdictional allegations of the petition and denies the substantive allegations therein. Respondent states that the grounds upon which it made its decision were based upon the factual testimony, from which it in its sound discretion "concluded that the penalty imposed substantiated such action" (sic).

The appeal was heard de novo, pursuant to Rule 6 of State Regulation No. 15. The transcript of the proceedings before the Board was marked in evidence, and further testimony was presented in accordance with Rules 6 and 8 of the said regulation.

Since appellant was afforded a full opportunity to present testimony at this plenary appeal hearing, the procedural allegation asserted in the petition has now been rectified on this appeal. Rule 6 of State Regulation No. 15. Cf. Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957); Cino v. Driscoll, 130 N.J.L. 535 (Sup.Ct. 1943); Rajah Liquors v. Division of Alcoholic Bev. Control, 33 N.J. Super. 598 (App. Div. 1955).

Before considering the facts and circumstances raised in the pleadings and the totality of the evidence as reflected in the transcripts, it would be appropriate initially to restate the basic principles which guide this action. The central issue in this case is whether or not the Board properly exercised its discretion in denying appellant's application for transfer. Conversely, it must be determined whether or not there was an unreasonable exercise of its discretion, thus an abuse of discretion. Simply stated, "discretion" must be reasonable; conversely, "abuse of discretion" is equated with unreasonableness. "Reasonable" is defined as "being in agreement with right thinking or right judgment; not absurd." Webster's (3rd Edition) New International Dictionary. "Reasonable" has also been defined as "governed by reason", "sensible;" also "fair", "equitable","fair-minded" and "suitable in the circumstances." 75 C.J.S. 634. What is "reasonable" must, of course, be determined according to the context and circumstances of each particular case.

As the court pointed out in Bivona v. Hock et al., 5 N.J. Super. 118, 121:

> "...the Legislature has not sought to delegate unlimited 'discretion' to these agencies, but rather has spelled out a system within the principles of which the agencies shall act. Accordingly, the courts must measure the propriety of the administrative action by the authority granted, and may not merely surrender the subject matter to the agencies on the premise that theirs is a discretion exercisable on the basis of any and all factors which pertain to the political issue of prohibition."

And further, at p. 120:

> "It seems to us that the issue is, not whether a discretionary power has been improperly exercised, but rather whether in the exercise of the power respecting transfers, R.S. 33:1-26, authority existed in the local body to refuse a transfer of a license for the reason upon which the refusal was based. Cf. South Jersey Retail Liquor Dealers Association v. Burnett, 125 N.J.L. 105 (Sup. Ct. 1940)."

The transfer of a liquor license, whether person-to-person or place-to-place, or both, is not an inherent or automatic right. If denied on reasonable grounds, such action will be affirmed. Richmon, Inc. v. Trenton, Bulletin 1560, Item 4. On the other hand, where it appears that the denial was unreasonable, arbitrary or capricious, the action will be reversed. Tompkins v. Seaside Heights, Bulletin 1398, Item 1; Silver Sands Motel v. Point Pleasant Beach, Bulletin 1624, Item 1.

As the court stated in Fanwood v. Rocco, 33 N.J. 404, 414:

> "Although New Jersey's system of liquor control contemplates that the municipality shall have the original power to pass on an application for a tavern or package store license or the transfer thereof, the municipality's action is broadly subject to appeal to the Director of the Division of Alcoholic Beverage Control. The Director conducts a de novo hearing of the appeal and makes the necessary factual and legal determinations on the record before him .... Under his settled practice, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgment and discretion was reasonable."

See Hightstown v. Hedy's Bar, 86 N.J. Super. 561.

Famous Kartzman's Delicatessen has held a liquor license and has conducted a delicatessen and restaurant since 1946 at the subject premises. Until about four years ago, when one of the partners retired from the business, the premises remained open until midnight or 1:00 or 2:00 a.m. on each night except Tuesdays. During the past four years it has remained open until 10 p.m. for six days a week.

Irving Slatkin (president of Kartzman's) testified that during the past few years there has been a dramatic change of residents of this area. Formerly the area was populated predominantly by white Jewish persons; today more than seventy-five per cent. of the population is Negro. He has noted also during the past year an increase in the sale of alcoholic beverages with the changing clientele of this facility. Although the preponderance of his patrons either purchase delicatessen or are served in the dining room, there is a considerable amount of patronage at the bar. He said there were three entrances to this establishment and a fourth entrance used for delivery purposes.

The corporate appellant presently operates a tavern known as Bergen Liquors & Bar at 920 Bergen Street, several blocks from the subject premises, and has operated this tavern for the past two years. It has no adjudicated record of license suspension for liquor violations. According to John Thomas (president), its present facility is operated in a decent and orderly manner. Thomas emphasized that appellant intends to operate Kartzman's in the same manner in which it is presently being operated; does not intend to make any interior structural changes; does not intend to have any entertainment and will continue to serve delicatessen as heretofore.

Appellant intends to remain open until "ten, eleven, twelve o'clock, whichever business dictates", except that the premises will remain open on Tuesdays. Questioned as to whether the word "lounge", included in its trade name, would indicate a change in its operation, Mr. Thomas interpreted a "lounge" as "a place where you can bring your family; sit down; have dinner and also have a cocktail." He emphatically denied that appellant intended to apply for a dance hall permit and reiterated that the intended operation will be substantially the same as that conducted by the proposed transferor. Mr. Thomas expects that the bulk of appellant's business would come from patrons within the immediate area.

Numerous objectors appeared at the hearing before the Board and at this plenary appeal hearing. Practically without exception, all agreed that they did not and would not object to the business as it is presently being conducted by Kartzman's. They also agreed that they did not know, nor did they challenge, the moral character or fitness of any of appellant's principals. The thrust of the objection was apprehension that this facility would change its present character and become a tavern, with the concomitant noise, drunks, disturbances and deleterious influences they attributed to taverns.

Rabbi Oscar Kline, representing the clergy of the Weequahic section, in which the licensed premises are located, expressed the feeling of the clergyman in this area that these premises would be turned into a bar or cocktail lounge, which they considered objectionable. A change of this nature would, in his opinion, ruin the neighborhood. Rabbi Kline's congregation is located a substantial distance from the licensed premises so that, as far as his synagogue is concerned, his congregants were not affected. He also admitted that the Congregation Agudath Israel, at Bergen Street and Lehigh Avenue, acquired its present premises about two or three years ago and that the Church of All People, located about a block away, was also established within the past five years (long after the license was issued to Kartzman's). The Rabbi explained that there has been a complete change in this area "from a predominantly white area to a mixture of other people."

William Gaines expressed similar apprehension about the possible change in the character of the licensed premises, although he hastened to emphasize that he has no objection to the existence and operation of the present licensed premises, nor does he have derogatory information or knowledge with reference to appellant and its present operation.

Maurice Berlinrut, First Vice President of the Weequahic Community Council, testified to the same effect and added that seven other liquor facilities are in the immediate area. He stated that "we objected to this transfer because we, the people in our community, are very much opposed to any more liquor outlets or more liquor in any form or fashion coming into our community." When it was pointed out that the transfer would not result in an additional liquor outlet since this is a person-to-person transfer, he stated that he was fearful that the character of the operation would change. However, he hastened to add that he had no objection to the present operation of Kartzman's, "It's a nice place."

Irwin Lehr (a neighboring tobacconist) agreed with the other witnesses and felt, in addition, that there might be a traffic problem if the nature of the operation changed. He pointed out several incidents involving drunken patrons of other taverns in the neighborhood. He added that "we have no objection to Kartzman's Delicatessen. There is no problem caused now.... It is the future that we are concerned about."

Maurice S. Bernardik (director of public and community relations of Newark Beth Israel Hospital, which is located about six blocks from the said premises) was also apprehensive that a change in the character of the operation of these premises would adversely affect the personnel of the hospital, which is presently in the process of a program of expansion. He noted that the hospital had been the scene of several incidents involving drunk and disorderly persons coming on to the hospital property and he was fearful of an increase of such incidents.

In this connection it should be noted that the hospital filed objections to an application for place-to-place transfer by Lyons Farms Tavern, Inc. so as to include a thirty-foot addition to be constructed at the rear of its premises at 368 Clinton Place, Newark. Those premises were located about a block from the hospital. On appeal from the denial of the application, the Director reversed the action of the Board, holding that there was no testimony that the place-to-place transfer would aggravate the number of licenses in the area as it is only intended to construct a building to extend the size of the premises which are already licensed. Lyons Farms Tavern, Inc. v. Newark, Bulletin 1777, Item 2. In disposing of the same arguments that were raised in the matter sub judice, the Director stated:

> "The testimony presented in this case by those in opposition to the transfer is merely conjecture on the part of said objectors, that, if the extension to the building was permitted, the premises will be improperly operated. However, over the years that the appellant has been operating at the present location he has never been charged with any violation at any time whatsoever."

In assessing and evaluating the testimony in this matter, it must be understood that the application is for a person-to-person and not a place-to-place transfer of the license. As in the Lyons Farms case, the number of licenses presently existing in the area would not be aggravated. Further, there is the clear and explicit representation by appellant that it will carry on the business as it has been carried on by Kartzman's. Fears and apprehensions of the objectors should be put at rest since it must be assumed that the premises will be conducted in the manner as represented and that it will not be converted to the usual tavern, nor will a dance hall be permitted on the premises.

A licensee's responsibility for the conduct of licensed premises in strict observance of the Alcoholic Beverage Law, State regulations and local ordinances is a heavy one. In view of the objections made with respect to the character of this facility, appellant's future responsibility becomes especially heavy. Licenses are issued annually and, if appellant conducts these premises in violation of the law and in a manner offensive to the public interest, the Board may consider those factors when the application for renewal is made. Four Corners Bar v. Newark, Bulletin 1152, Item 1.

It is important to note that in denying this application the Board did not seek to impose special conditions on the license, which it might very well have done if the same were reasonable. Such special condition could have provided that the licensed premises be operated in the same manner (i.e., as a delicatessen and restaurant as heretofore). Although appellant has so represented, it would have allayed the fears of the objectors. See Lubliner v. Bd. of Alcoholic Bev. Con., Paterson, 33 N.J. 428, at p. 447 (Sup. Ct. 1960); Asbury Park Licensed Bev. Assn. v. Asbury Park, Bulletin 911, Item 3; cf. R.S. 33:1-32. But the Board summarily denied the transfer. In an emotional statement at the opening of the hearing before the Board, one of the Board members expressed the following before any testimony had been taken:

> "I want it understood, and I wish to tell all the people, that as long as I am a Commissioner of this Board, I am not going to vote for the location of any tavern in the Weequahic area. We must have some place in Newark where middle class negroes can operate a good and clean business, just as on Market Street and Broad Street."

Before hearing the testimony, he apparently was under the erroneous impression that a place-to-place transfer was sought, rather than that which was then before him.

Another objection raised to this transfer was that, because of the change in residents that had occurred in the neighborhood, there would be less demand for delicatessen and a greater demand for alcoholic beverages. See Bivona v. Hock, 5 N.J. Super. 118 (App. Div. 1949), reprinted in Bulletin 860, Item 1. In this connection it should be noted that the succulent corned beef and pastrami sandwich is not the exclusive monopoly of any one ethnic group. Blacks as well as whites enjoy these delicacies, and will continue to enjoy them.

Petitions which were introduced in evidence in opposition to this transfer were gathered by William B. Green, a resident

of the area. He admitted that the legend on the petition stated in part:

> "...the Kartzman's Delicatessen at 1059 Bergen St. is selling out to a tavern. We are against the opening of a bar in our immediate neighborhood."

This witness admitted that he was not aware that a transfer from person to person was involved, and he did not communicate that fact to the signers of the petition.

Petitions are always influential as a medium for presenting the views of a group. However, the mere counting of noses cannot serve as a substitute for the considered determination of the municipal issuing authority in fulfilling its obligation and responsibility in its designated capacity. Petitions are given weight after proper discount for self-interest and the often irresponsible way in which they are signed as a friendly accommodation without considered thought of the contents or of arguments on the other side. The weight to be given a petition must, in large measure, depend on what it states, who signs it, and how it accords with the policy and common sense of the officials responsible for the administration of the law and whose duty and privilege it is to hear both sides. Bay Motel Corp. v. Upper, Bulletin 1761, Item ; Dunster v. Bernards, Bulletin 99, Item 1. The legend on this petition and the admission that few, if any, of the signers actually read the said legend plainly dilute its qualitative effect and the weight which should be accorded to it.

In addition to the other compelling considerations supporting the grant of the said person-to-person transfer, it is, in my view, common-sensical that, in the light of the radical change in the populational character of this neighborhood (from a seventy-five per cent. white Jewish to its present seventy-five per cent. black constituency), the proposed transfer of operation from the present licensee, whose principals are white, to the appellant, whose principals are black, would be fully consonant and in harmony with the public good. Cf. Blanck v. Magnolia, 38 N.J. 484; Lubliner v. Bd. of Alcoholic Bev. Con., Paterson, supra, (33 N.J. 428, at p. 433).

I find, from my consideration of the record, that appellant's principal officers are persons of unquestioned moral character; that appellant has operated and is presently operating an orderly tavern free of any record of liquor law violations; that it has affirmatively represented its intention to operate the premises in question substantially in the same manner as it is being operated by the transferor; and that it appears to be qualified in every way to conduct a licensed business thereat.

On the other hand, the arguments of the objectors might have some validity if a place-to-place transfer were involved and a new license introduced into this area. There is no factual foundation in the record to support the objections voiced herein, and I find them to be purely conjectural. See Neiden Bar and Grill v. Newark, 40 N.J. Super. 24; Lancar Golf and Country Club v. Washington, Bulletin 789, Item 4. My consideration of the record and the arguments of counsel compels the conclusion that the denial of the transfer was against the logic and sum of the presented facts. Cf. Hudson Bergen County Retail Liquor Stores Assn. v. Hoboken, 135 N.J.L. 502. Cf. South Jersey Retail Liquor

Dealers Association v. Burnett, 25 N.J.L. 105 (Sup. Ct. 1940).

I conclude that the Board has not exercised a rational discretion and that its action herein was unreasonable, erroneous and an abuse of its discretion. Ott's, Inc. v. Edgewater Park, Bulletin 808, Item 4; cf. Lance Corp. v. Highlands, Bulletin 1581, Item 2. I further find that appellant has sustained the burden imposed upon it under Rule 6 of State Regulation No. 15. It is therefore recommended that the Board's action be reversed and that it be ordered to grant the transfer in accordance with the application.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15. However, on my own motion oral argument was held. Thereafter a memorandum was filed by the objector Newark Beth Israel Hospital, and an answering memorandum was filed by the appellant.

I have carefully considered the entire record herein. It is apparent that the denial of the instant transfer application by the respondent Board was predicated upon an apprehension that the applicant would conduct a "tavern type business" rather than a restaurant and delicatessen ("delicatessen" in the sense of selling prepared sandwiches and foods) at the licensed place of business. In this connection the statement of reasons for such action set forth by the Board in the transcript of its proceedings discloses that the Board took under consideration the imposition of a special condition, pursuant to R.S. 33:1-32, as a part of a grant of the transfer to insure the continuance of a restaurant and delicatessen type business in the future. However, such course of action was rejected by the Board apparently upon the basis that it was without authority to do so and that, in any event, enforcement by the municipal police of compliance with such special condition would be at best uncertain.

As the Hearer properly pointed out, however, there is in fact ample authority under the Alcoholic Beverage Law for the imposition of a special condition that the licensed business be conducted as a restaurant. R.S. 33:1-32. Lubliner v. Board of Alcoholic Beverage Control for the City of Paterson, 33 N.J. 428, 447 (1960). Further, in a telegram of April 18, 1968 to the Board, counsel for the appellant stated:

> "On behalf of my clients 4 Leaf Liquors & Lounge I desire that the record made on April 10th 1968 indicate that if the person to person transfer is granted my clients will operate the business under similar conditions that exist under present management and in accordance with ABC regulations my clients will also use the trade name 4 Leaf Deli in operating the business on the licensed premises."

(At the oral argument held herein appellant stated it was willing to accept the transfer subject to a special condition that the licensed business be operated as a restaurant as defined by the Alcoholic Beverage Law.) Under the circumstances, there being no question as to the fitness of the applicant for the transfer, denial of the application was unreasonable and unwarranted (cf. Neiden Bar and Grill, Inc. v. Newark, 40 N.J. Super. 24 (App. Div. 1956)); attainment of the Board's professed goal could have

been more reasonably accomplished by the imposition of a special condition, enforcement of which should prove no great difficulty.

I will therefore adopt the recommended findings and conclusions of the Hearer, with the modification that a special condition be imposed as part of the grant of the license transfer to the effect that appellant shall conduct a restaurant (as defined by R.S. 33:1-1(t)) at the licensed place of business with no increase in the size of its present bar, which appears to be about six feet, and shall use only the trade name "4 Leaf Deli" or other similar name denoting a delicatessen or restaurant whenever advertising such business. Bayonne v. B & L Tavern and Division of Alcoholic Beverage Control, (App. Div. 1963), not officially reported, reprinted in Bulletin 1509, Item 1, affirmed 42 N.J. 131, 134 (1964); Epstein v. Division of Alcoholic Beverage Control (App. Div. 1964), not officially reported, certif. denied 43 N.J. 260 (1964).

Accordingly, it is, on this 7th day of November 1968,

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control of the City of Newark be and the same is hereby reversed; and it is further

ORDERED that said respondent transfer the license to appellant in accordance with the application heretofore made subject to the special conditions that (1) the licensed place of business must be operated and conducted as a bona fide restaurant (as defined by R.S. 33:1-1(t)), (2) there be no public bar utilized at the licensed premises other than the existing bar, approximately six feet in size, and (3) the appellant use only the trade name "4 Leaf Deli" or other similar name denoting a restaurant or delicatessen whenever advertising its licensed business.

JOSEPH M. KEEGAN
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - GAMBLING (NUMBERS BETS) - PRIOR DISSIMILAR RECORD - LICENSE SUSPENDED FOR 65 DAYS.

In the Matter of Disciplinary Proceedings against	)	
HELEN JUNE THORNE t/a Bridge Plaza Beer Garden 825 Amboy Avenue Perth Amboy, New Jersey	)	CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-6, issued by the Board of Commissioners of the City of Perth Amboy.	)	

Wilentz, Goldman & Spitzer, Esqs., by Robert W. Lewandowski, Esq., Attorneys for Licensee

Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges:

> "1. On December 5 and 13, 1967, you allowed, permitted and suffered gambling in and upon your licensed premises, viz., the making and accepting of bets in a lottery, commonly known as the 'numbers game', and on said date of December 13, 1967, allowed, permitted and suffered in and upon your licensed premises, slips, tickets, records, memorandum or other writings pertaining to said gambling; in violation of Rule 7 of State Regulation No. 20.
>
> "2. On December 5 and 13, 1967, you allowed, permitted and suffered tickets and participation rights in a lottery, commonly known as the 'numbers game', to be sold and offered for sale in and upon your licensed premises, and allowed, permitted and suffered such tickets and participation rights in and upon your licensed premises; in violation of Rule 6 of State Regulation No. 20."

The Division offered the testimony of three ABC agents in substantiation of the charges.

Agent J. who possessed ample experience in conducting gambling investigations, including numbers betting, gave the following account: Pursuant to specific assignment to investigate gambling activity in the licensed premises, and accompanied by Agent M. he entered the licensed premises (characterized as a neighborhood tavern) on December 5 at approximately 11:30 a.m. The agents "sat about midway in the bar". A barmaid, identified as Mary Koncz, was in attendance. The patronage consisted of two males. At approximately 11:40 a.m. the barmaid was relieved by a male identified as Hipolito Quiles. Later another male, identified as Abelardo Mendez, entered the tavern, went to the two

patrons and "took out a blue slip and he started writing something on it after having conversation with the two males." He could not see what was written. Another male entered the premises. Mendez was observed to confer with him and again write on the blue piece of paper. The male then handed Mendez two one-dollar bills. Thereafter Mendez entered the telephone booth, "took the slip out" and talked on the telephone.

After leaving the telephone booth, Agent J called Mendez over to where he and M were seated. At that time, the agent having ordered two bottles of beer, the bartender was stationed directly across the bar. The questioning then revealed the following:

> "Q In that position, tell us what occurred and what you said and what, if anything, Mr. Abelardo said?
>
> A I told Mr. Abelardo that I had a couple of numbers I wanted to play with him. He told me he had just called... his numbers in, but he would take them. I then told him I wanted to play 513 and 421. He took the same blue piece of paper out of his pocket, placed it on the bar, wrote the two numbers down, and he asked me how much did I want to play them for and I said one dollar each. He then wrote '$1' besides the first number and wrote a line down from the first number to the second number on the slip. I then gave him the money. He proceeded to the telephone. He later returned to me at the bar and stated that he got the numbers in.
>
> Q At the time that you had this occurrence with him and this conversation, where was the bartender?
>
> A He was stationed in front of us."

The numbers writing was done on the bar.

Agents J and M revisited the licensed premises on December 13 at approximately 11:30 a.m. and positioned themselves "about midway at the bar." J had in his possession three marked one-dollar bills. Shortly after entering, the licensee Helen June Thorne relieved Mrs. Koncz behind the bar. Quiles was also performing services in the tavern, including tending bar. At 11:40 a.m. Division Agent B entered the premises and sat to the right of J and M. At approximately 12:10 p.m. Mendez entered the tavern, sat at the bar and conversed with some patrons. When J called to Mendez at approximately 12:15 p.m., Mendez came toward him and motioned to the agent "to follow him to the other side of the premises." About six or seven feet from the bar Mendez took a white slip of paper out of his pocket and asked, "How many?" J first called off six numbers (513, 421, 118, 038, 200 and 821) which Mendez wrote on the slip and then told Mendez he wanted to play two additional numbers, 800 and 048. Mendez wrote those numbers on the reverse side of the slip. J informed Mendez that he wished to bet the sum of fifty cents on each number for a total of four dollars. The agent described the transaction as "number plays." In payment of the plays J handed Mendez the three marked one-dollar bills he had in his possession. After informing Mendez he needed change, J went to the bar next to Agents M and B. When queried as to what occurred next, the agent responded,

"I handed Mrs. Thorne a five-dollar bill and I said I wanted to get some ones because I want to play my numbers. She then gave me five one-dollar bills. I proceeded back over to Mr. Mendez and I gave him the one-dollar bills for the remaining two number plays." When requested to make change of the five-dollar bill Mrs. Thorne responded, "Sure." After paying Mendez J returned to the bar and said to Mrs. Thorne, "I got my numbers in. I hope I have a hit." Mrs. Thorne made no comment. While Mendez was positioned at the front end of the bar approximately fifteen feet away and Mrs. Thorne was behind the bar in front of him, J called out to Mendez, "If I have a hit, I'll pick it up here. One of those should come out." Mrs. Thorne did not comment, Mendez nodded.

Shortly thereafter J and M. identified themselves and pointed out Mendez to two local detectives who had entered the tavern. The officers found the three marked one-dollar bills and the numbers slip (heretofore referred to) among Mendez' possessions. The currency and the slip were received in evidence.

On cross examination J testified that on the occasion of the visit of December 5 the bartender Quiles did not participate in the conversation had between J and Mendez at the bar. Quiles was "just observing." Mrs. Thorne was not in the tavern on this occasion.

Mrs. Thorne was serving approximately five patrons on the occasion of the visit of December 13. She made no mention of numbers at all.

ABC Agent M's testimony was mainly corroborative of the testimony offered by J on direct and on cross examination. However, while J and Mendez were approximately eight feet removed from the bar on December 13, he was unable to overhear their conversation.

Agent B testified that he entered the licensed premises on December 13 at 11:40 a.m. and positioned himself at the right of J. J and M. had preceded him into the tavern. He observed J call Mendez toward him and Mendez beckon J away from the bar. He did not overhear any conversation between J and Mendez. His testimony then revealed the following:

"Q And did you see J again?
A Yes, I did.
Q How soon?
A He came, oh, I'd say about a couple of minutes later, he came to the bar.
Q Where with respect to you?
A He stood between me and another male at the bar, and he said to Miss Thorne, 'Let me have some one-dollar bills. I want to play some numbers with the fellow over there,' and he nodded towards Mr. Mendez's direction.
Q Did he give anything to Mrs. Thorne?
A Yes, a five-dollar bill.
Q What did she do?
A She gave him five singles.
Q Did she say anything?
A She said, 'Sure.'
Q Then what did he do?
A He took the five singles and went back to Mr. Mendez.

Q Then what did you do?
A I departed the premises and signaled the Perth Amboy police."

In defense of the charges, the licensee Helen June Thorne testified that she was not in the tavern on December 5 at noontime and had no knowledge of gambling activity therein. On December 13 she relieved Mrs. Koncz in tending bar at noontime. The patronage consisted of eight or nine persons. She was engaged in tending bar, checking on delivery of beer with Quiles and checking on delivery of sandwiches. She recalled the presence of J and M in the barroom. She did not observe any conversation concerning numbers betting or any form of gambling between J and M and any other patrons.

Mrs. Thorne recalled being asked for change of a five-dollar bill by J and she did give J five one-dollar bills. Immediately thereafter she went to the basement to check on a delivery of beer. The agent did not state his reason for requesting the change. She did not hear any conversation concerning numbers playing. She was not aware that Mendez on that date or on any prior date or that anyone else had engaged in taking numbers bets or otherwise engaged in gambling on the premises.

On cross examination Mrs. Thorne asserted that during the month of December 1967 Mendez patronized the tavern at lunch time four or five days a week with one of his fellow employees. He also patronized the tavern "sometimes in the evening after work." Although she had seen him converse with other patrons, she never observed him making notations of any kind.

On December 13 Mrs. Thorne did not hear J call out to Mendez, nor did she observe J and Mendez confer with each other, either at the bar or away from the bar. She did not hear J say that he wanted to engage in numbers betting "with that fellow over there" when J asked her for change of a five-dollar bill. Inasmuch as she immediately descended the stairs into the basement, she did not see what J did with the singles. If she had used the word "sure" to J, it was used solely in response to his request to "break the five-dollar bill." Thereafter she had no conversation with J and he said nothing concerning playing numbers that day. Mendez was positioned approximately four or five feet to the right of J. She was behind the bar between them. She heard no conversation between the two males.

On redirect examination Mrs. Thorne averred that other persons patronized the tavern daily at lunch time.

Hipolito Quiles recalled tending bar on December 5; however, he did not remember seeing the ABC agents until December 13. He never saw anyone, including Mendez, ever place a numbers bet in the tavern or converse concerning the placement of numbers bets.

In rebuttal J and M testified that Mrs. Thorne did not descend into the cellar after changing the five-dollar bill for J.

Thus it is apparent that an essentially factual question is presented for deliberation.

In matters of this nature we are guided by the firmly established principle that disciplinary proceedings against

liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960); Howard Tavern, Inc. v. Div. of Alcoholic Beverage Control (App. Div.1962), not officially reported, reprinted in Bulletin 1491, Item 1.

In appraising the factual picture presented herein, the credibility of witnesses must be weighed. Testimony to be believed, must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

I closely observed the demeanor of the witnesses as they testified and have made a careful analysis and evaluation of their testimony. I am persuaded that ABC Agent J's testimony, wherein he graphically depicted the numbers betting activity engaged in on the licensed premises by Mendez on December 5 and 13, 1967, was credible. My view is buttressed by the fact that items described as numbers bets and the three marked one-dollar bills were found among Mendez's possessions on December 13.

Referring to the date of December 5, I am convinced that the agents' testimony portraying the numbers betting engaged in by Agent J and Mendez at the bar in the immediate presence of the bartender Quiles was undeniably factual. The bartender's denial of the existence of this activity and his assertion that he did not see the agents in the tavern on that date were wholly unbelievable. The licensee is, of course, fully responsible for the activities of her employee during his employment on the licensed premises. Kravis v. Hock, 137 N.J.L. 252; In re Schneider, 12 N.J. Super. 449 (App. Div. 1951); Rule 33 of State Regulation No. 20. The activities and the knowledge of the bartender become the knowledge and responsibility of the licensee.

Concerning the numbers betting activity which I feel beyond doubt took place on December 13 between J and Mendez, again I am convinced that J made known to the licensee that he and Mendez had engaged in such proscribed activity and that the licensee abjectly allowed, permitted and suffered that activity upon the licensed premises. Considering the totality of the testimony, it can be inferred that Mendez was a numbers bookmaker.

After carefully considering all of the evidence adduced herein and the legal principles applicable thereto, I conclude that the Division has proved its case by clear and convincing testimony and by a fair preponderance of the credible evidence. I therefore recommend that the licensee be found guilty of the said charges.

Licensee has a previous record of suspension of license by the municipal issuing authority for five days effective November 29, 1965, for sale during hours prohibited by State Regulation.

The prior record of suspension of license for dissimilar violation within the past five years considered, it is further recommended that the license be suspended for sixty-five days. Re Castillo de Jagua, Inc., Bulletin 1793, Item 5.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

Having carefully considered the entire record herein, including the transcript of the testimony and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 6th day of November, 1968,

ORDERED that Plenary Retail Consumption License C-6, issued by the Board of Commissioners of the City of Perth Amboy to Helen June Thorne, t/a Bridge Plaza Beer Garden, for premises 825 Amboy Avenue, Perth Amboy, be and the same is hereby suspended for sixty-five (65) days, commencing at 2:00 a.m. Wednesday, November 13, 1968, and terminating at 2:00 a.m. Friday, January 17, 1969.

JOSEPH M. KEEGAN
DIRECTOR

3. STATE LICENSES - NEW APPLICATION FILED.

Otto Meier and Fred C. Ramm, Jr.
t/a M/R Distributors
501 Route #17
Carlstadt, New Jersey

Application filed December 9, 1968 for person-to-person transfer of State Beverage Distributor's License SBD-152 from Beer Depot, Inc.

Joseph M. Keegan
Director